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No. 87-1440

Supreme Court, U.S.

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In The
Supreme Court of the United States

October Term, 1987

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SAN DIEGO AND IMPERIAL COUNTIES
BUTCHERS' AND FOOD EMPLOYERS'
PENSION TRUST FUND,

Petitioner,

v.

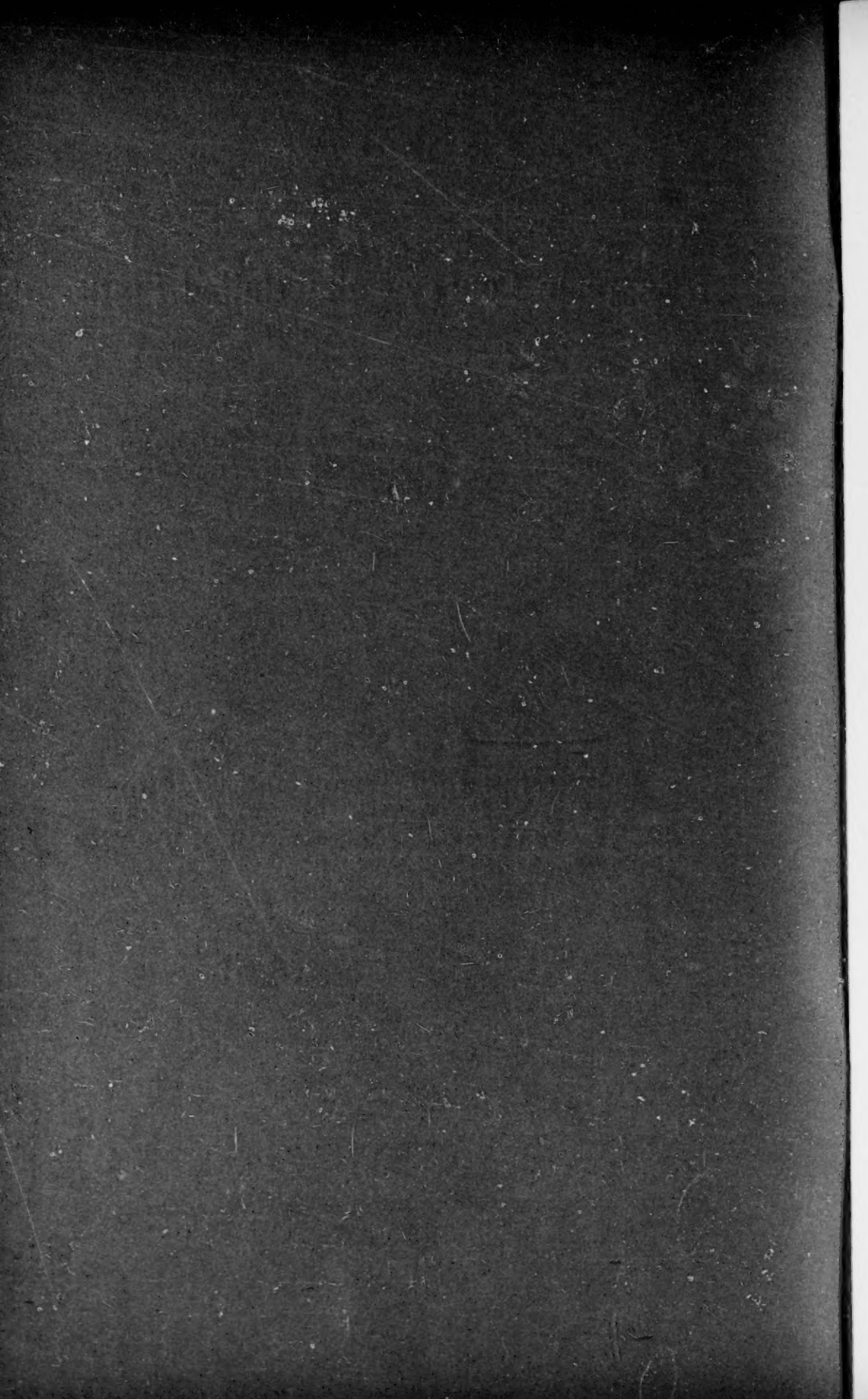
CUYAMACA MEATS, INC.,
C & M MEAT PACKING CORP., and
NATIONAL MEAT PACKERS, INC.,

Respondents.

— o —
**OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT**

— o —
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QUESTIONS PRESENTED

1. For purposes of determining the date of withdrawal from a multiemployer pension fund and calculating withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), did the Court of Appeals for the Ninth Circuit correctly conclude that the Employers' obligation to contribute to the Pension Fund ceased on September 1, 1983, when the Employers lawfully stopped making contributions in accordance with the terms of their final offer to the Union?

2. Did the Court of Appeals for the Ninth Circuit correctly conclude that a proposal openly made during arms-length collective bargaining which fixed the date the Employers would stop participating in the Pension Fund, was not a "transaction entered into to evade or avoid withdrawal liability" within the meaning of 29 U.S.C. § 1392(c)?

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SAN DIEGO AND IMPERIAL COUNTIES
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PENSION TRUST FUND,

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CUYAMACA MEATS, INC.,
C & M MEAT PACKING CORP., and
NATIONAL MEAT PACKERS, INC.,

Respondents.

**OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT**

Cuyamaca Meats, Inc., C & M Meat Packing Corp.,
and National Meat Packers, Inc. ("Employers'")¹ hereby
oppose the Petition for a Writ of Certiorari to the United

¹ There are no parent corporations, subsidiaries other than wholly owned subsidiaries or affiliates requiring a listing under Supreme Court Rule 28.1.

States Court of Appeals for the Ninth Circuit ("Petition") filed by the San Diego and Imperial Counties Butchers' And Food Employers' Pension Trust Fund ("Pension Fund").

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OPINIONS BELOW

The District Court's opinion and order granting the Employers' motion for summary judgment is reported in *Cuyamaca Meats, Inc. et al. v. San Diego and Imperial Counties Butchers' and Food Employers' Pension Trust Fund*, 638 F. Supp. 885 (S.D. Cal. 1986). The unanimous opinion of the United States Court of Appeals for the Ninth Circuit affirming the District Court's judgment and order is reported in *Cuyamaca Meats, Inc. et al. v. San Diego and Imperial Counties Butchers' and Food Employers' Pension Trust Fund*, 827 F.2d 491 (9th Cir. 1987).

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JURISDICTION

The Petition was filed and docketed on February 29, 1988, ninety (90) days after the United States Court of Appeals for the Ninth Circuit filed its order denying the Pension Fund's petition for rehearing and rejecting the suggestion for rehearing *en banc*. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

STATUTES INVOLVED

The statutory provisions which this case involves are:

1. Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5).
2. Section 302(c)(5) of the Labor Management Relations Act of 1947, 29 U.S.C. § 186(c)(5).
3. Sections 4203, 4212, and 4218 of the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1383, 1392, and 1398.

The relevant text of these statutes is set forth verbatim in Appendix D to the Pension Fund's Petition with the exception of 29 U.S.C. §§ 1392(c) and 1398. The text of the omitted statutes is set forth in Appendix "A" hereto.

STATEMENT OF THE CASE

The² Pension Fund is a jointly trustee labor-management trust fund created pursuant to Section 302(c)(5) of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 186(c)(5). The Pension Fund exists pursuant to a declaration of trust and is organized to receive contributions and make payments for the purpose of providing retirement benefits to employees of participating employers. The Pension Fund is a multiemployer em-

² This case was decided on cross-motions for summary judgment. There are no disputed factual issues. This summary is based on the Excerpts of Record submitted by the Pension Fund to the Court of Appeals (cited herein as E.R. p. —).

ployee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974, as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1002(37)(A) and 1301(a)(3).

Each of the Employers were parties to identical collective bargaining agreements with the United Food and Commercial Workers Union Local 229A ("Union"). The most recent collective bargaining agreements were effective October 1, 1979 through March 31, 1983. In these agreements, the Employers agreed to accept the terms of and become a party to the trust agreement which established the Pension Fund. Each Employer also agreed to contribute on a monthly basis to the Pension Fund specified sums based on hours worked by employees represented by the Union.

Collective bargaining negotiations between the Employers and the Union commenced on March 28, 1983, just prior to the collective bargaining agreements' March 31, 1983 expiration date. While negotiations continued, and following the expiration of the collective bargaining agreements, the Employers continued to make contributions to the Pension Fund in accordance with the terms of the expired agreements.

During the negotiations, the Employers submitted proposals to the Union to establish defined contribution plans or individual retirement accounts on behalf of eligible employees in lieu of making contributions to the Pension Fund. The Union repeatedly rejected these proposals and demanded that the Employers continue to participate in the Pension Fund.

On April 22, 1983, each of the Employers presented an identical written offer to the Union, termed a "final offer." With respect to pensions, the offer proposed that the Employers would establish and contribute to individual retirement accounts on behalf of the employees. At the meeting, the Employers advised the Union that they were willing to negotiate defined contribution plans in lieu of individual retirement accounts.³

On April 29, 1983, in response to the Employers' inquiry, the Pension Fund notified the Employers that the market value of the Pension Fund's assets had increased significantly since the end of the last plan year, June 30, 1982. (The level of assets of the Pension Fund was a key factor in determining the withdrawal liability that the Employers would incur upon separating from the Pension Fund. The withdrawal liability would be calculated based on the unfunded liability of the Pension Fund as of the end of the last plan year.) The Pension Fund advised the Employers that the increase in the value of the assets of the Pension Fund was such that, if the last plan year had ended on March 31, 1983, instead of June 30, 1982, the Employers' withdrawal liability would be reduced by almost one million dollars.

On May 2, 1983, the Union notified the Employers by telegram that the April 22 offer had been rejected by the

³ The Pension Fund's statement in the Petition that the April 22, 1983 final offer "called for immediate cessation of all Employer contributions to the Pension Trust" (Pension Fund's Petition, page 4) is inaccurate. The written proposal did not specify when the Employers would convert to a different pension plan. E.R. p. 223.

Union membership. The Union requested additional negotiations, stating "we are not at impasse."

The next negotiating session was held on May 5, 1983. At that meeting, each of the Employers revised their offer of April 22, 1983, with respect to retirement as follows:

Amend Section XVIII, Retirement, to provide:

1. The Company shall continue its present pension plan through August 31, 1983, which shall be subject to an eligibility requirement of twelve (12) months' continuous service.

2. The plan set forth in Section XVIII of the Companies' April 22, 1983, proposal shall become effective September 1, 1983.

It is undisputed that the Employers amended their pension proposal for two reasons: (1) It appeared that the Pension Fund's unfunded liability had declined, and the Employers hoped to minimize their withdrawal liability by negotiating a transition in retirement programs during a plan year in which there might be less unfunded liability; and (2) the Employers believed that they might have a better chance of settling a contract with the Union which provided for a defined contribution plan rather than IRA's, and to preserve this possibility, the May 5 proposal allowed a reasonable amount of time to draft a defined contribution plan and qualify it through the Internal Revenue Service.⁴

⁴ The Pension Fund's statement in the Petition that the Employers' sole purpose in amending their proposal was to reduce their withdrawal liability is inconsistent with the undisputed factual record. E.R. pp. 226-31.

Between May 5 and May 23, 1983, negotiations continued during which the Union submitted a series of revised proposals. With respect to retirement, the Union continued to insist that the Employers participate in the Pension Fund. However, no agreement was reached, and on May 23, 1983, the Employers advised the Union that an impasse existed.

On May 24, 1983, the Employers implemented the economic terms of their April 22 offer as modified on May 5, 1983. With respect to pensions, the proposal implemented by the Employers provided for contributions to the Pension Fund through August 31, 1983. The Employers did tender such contributions through August 31, 1983. However, the Pension Fund refused to accept the contributions for hours worked after May 23, 1983.

On June 8, 1983, the Union commenced a strike and picketing against the Employers. The Employers continued their operations with supervisors, employees who crossed the picket lines, and replacements for the striking employees.

On June 28, 1983, the Union filed unfair labor practice charges against the Employers with the National Labor Relations Board ("NLRB"). The charges alleged that the Employers had violated Section 8(a)(5) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158 (a)(5), by refusing to bargain in good faith. The Union contended that no *bona fide* impasse existed on May 23, 1983, and that, therefore, the Employers were not privileged to implement their final offer. On August 11, 1983, the NLRB Regional Director dismissed the charges and subsequently, the NLRB Office of Appeals upheld the

dismissals, stating that "a genuine impasse had, in fact, occurred by May 24, when the Employers implemented their final offer."

On September 30, 1983, the Pension Fund sent a letter to each of the Employers stating that the Pension Fund had determined that the Employers had ceased to have an obligation to contribute to the Pension Fund as of May 23, 1983, the date of impasse in negotiations. The Pension Fund claimed that the Employers were indebted to it for the following withdrawal liability, calculated assuming a May 23, 1983 withdrawal date:

Cuyamaca Meats, Inc.	\$279,750.08
C & M Meat Packing Corp.	428,329.46
National Meat Packers, Inc.	146,127.28

Despite the Employers' request for reconsideration, the Pension Fund refused to modify its position and this litigation ensued. The Pension Fund has not attempted to collect the withdrawal assessments during the pendency of this litigation.

In February, 1984, the Employers learned that their withdrawal liability, if calculated based on a withdrawal date of September 1, 1983, (the date on which the Employers actually stopped tendering contributions to the Pension Fund in accordance with their final offer to the Union) would be the following:

Cuyamaca Meats, Inc.	\$38,213.76
C & M Meat Packing Corp.	48,226.50
National Meat Packers, Inc.	14,881.32

The Employers filed a complaint for declaratory judgment in the United States District Court for the Southern District of California on May 1, 1984. The Pension Fund filed a counter-claim for declaratory judgment on May 22, 1984. Both sides sought a declaration of the date on which the Employers withdrew from the Pension Fund.

On cross motions for summary judgment, the District Court granted summary judgment in favor of the Employers and declared that "the plaintiffs withdrew from the defendant Trust Fund on September 1, 1983." The Court of Appeals for the Ninth Circuit unanimously affirmed the District Court's conclusion, and subsequently denied the Pension Fund's petition for rehearing and suggestion for rehearing *en banc*.

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ARGUMENT

A. The Petition Fails to Set Forth any "Special and Important" Reasons Warranting Review by this Court.

Discretionary review by statutory certiorari is granted in exceptional circumstances and "only when there are special and important reasons therefor." Sup. Ct. R. 17.1. The Pension Fund has not even attempted to delineate any "special and important" reasons of the character illustrated in Rule 17.1(a), or any adequate reason independent of Rule 17.1(a) worthy of the Court's review. The Pension Fund merely reargues the points it unsuccessfully advanced to the courts below, and which were fully considered and correctly decided. There are no issues of

Constitutional magnitude. The Pension Fund is unable to point to any conflicting decision by any federal court of appeals or any state court with respect to the legal issues involved.

This case simply involves the application of well-settled principles of federal labor law to determine when a withdrawal occurred under MPPAA. MPPAA directs that the date of withdrawal is determined by reference to the Employers' obligation to contribute under applicable labor-management relations law. In this case, the Court of Appeals properly concluded that the Employers were obligated to contribute to the Pension Fund until September 1, 1983, when they were permitted to cease contributing in accordance with their final offer to the Union. The Court of Appeals' conclusion is supported by settled law and is consistent with the NLRB's decision that the Employers acted in accordance with their legal obligations under Section 8(a)(5) of the NLRA when they implemented their final offer providing for withdrawal from the Pension Fund on September 1, 1983.

The Pension Fund cannot establish that there has been any departure from established precedent. The Pension Fund claims in its Petition that there is "no authority" for various of the Court of Appeals' conclusions, but the Pension Fund has been unable to distinguish the authority cited by the Court of Appeals in its decision. The Pension Fund's contention that the Court of Appeals' decision is contrary to the holdings of other panels within the Ninth Circuit was previously raised and implicitly rejected by the Court of Appeals when it denied the petition for rehearing and suggestion for rehearing *en banc*,

and is entirely without basis. The Pension Fund's contention that the Employers' bargaining proposal fixing a withdrawal date of September 1, 1983 must be disregarded under Section 4212(c) of MPPAA as a "transaction to evade or avoid withdrawal liability," lacks any support in the plain language of the section, its legislative history, or reported decisions. Accordingly, there are no grounds which warrant the exercise of discretionary review by this Court, and the Pension Fund's Petition for a Writ of Certiorari should be denied.

B. The Court of Appeals Applied Settled Principles of Federal Labor-Management Relations Law to Determine that the Employers Had an Obligation to Contribute to the Pension Fund After Impasse Until September 1, 1983.

The Court of Appeals correctly rejected the Pension Fund's contention that the Employers' duty to contribute to the Pension Fund ceased under federal labor law on May 23, 1983, when the Union and the Employers had reached an impasse in their negotiations. The Pension Fund misstates the Court of Appeals' holding as "that which is allowable after impasse under federal law equates to a binding obligation on both parties" (Trust Fund's Petition, page 8). In fact, the Court of Appeals correctly held in accordance with basic, well-settled principles of federal labor law that the Employers were obligated to contribute after impasse until September 1, 1983.

The Employers' obligations with respect to continued participation in the Pension Fund were defined by Section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5). Under established law, it is clear that the Employers' obligation

under Section 8(a)(5) to bargain in good faith with the Union over changes in terms and conditions of employment afforded them two, and only two, lawful options: (1) maintain the conditions of employment set forth in the expired collective bargaining agreements until impasse or until they reached new collective bargaining agreements with the Union (*American Distributing Co. v. NLRB*, 715 F.2d 446, 449 (9th Cir. 1983), *cert. denied*, 446 U.S. 958 (1984); *Producers Dairy Delivery Co. v. Western Conference of Teamsters Pension Trust Fund*, 654 F.2d 625, 627 (9th Cir. 1981); *Peerless Roofing Co. Ltd. v. NLRB*, 641 F.2d 734, 736 (9th Cir. 1981)); or (2) implement changes in terms of employment which were reasonably comprehended within the Employers' final offer to the Union (*Taft Broadcasting Co.*, 163 NLRB 475, 478, *enf'd.*, 395 F.2d 622 (D.C. Cir. 1968); *Peerless Roofing Co. v. NLRB*, *supra* at p. 735; *Clear Pine Mouldings, Inc. v. NLRB*, 632 F.2d 721, 729-30 (9th Cir. 1980), *cert. denied*, 451 U.S. 984 (1981)).

In either case, the Employers had an obligation to contribute to the Pension Fund after impasse. Under option (1) described above, the Employers could have maintained the *status quo* and contributed to the Pension Fund until they reached agreement with the Union to stop contributing. Under option (2) described above, the Employers were required to continue contributing to the Pension Fund until September 1, 1983, when they were permitted to withdraw in accordance with their final offer as to which the Employers had negotiated to impasse with the Union. In fact, the Employers exercised their right to withdraw and ceased making contributions after August 31, 1983. The NLRB Regional Director and Office of

Appeals confirmed that the Employers had acted in accordance with their obligations under Section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5).

The Pension Fund's argument that the Employers were permitted to make contributions after impasse, but were not required to do so, is utterly inconsistent with the rules and principles of good faith collective bargaining under federal labor law. For the Employers to have stopped contributing to the Pension Fund sooner than they had proposed in their final offer to the Union would have violated their obligation to bargain in good faith with the Union under Section 8(a)(5) of the NLRA. The Employers were not privileged to withdraw on May 23, 1983 because they had not bargained to do so. *See e.g., Crest Beverage Co.*, 231 NLRB 116, 119 (1977) and cases cited therein, and *Wayne's Olive Knoll Farms*, 223 NLRB 260, 265 (1976).

Section 4212(a)(2) of MPPAA, 29 U.S.C. § 1392(a)(2) directs that the date of withdrawal shall be determined in accordance with an employer's obligations under applicable labor management relations law. Here, the Court of Appeals properly applied the MPPAA standard in accordance with the Employers' obligations under the National Labor Relations Act. The Court of Appeals' holding also is consistent with the NLRB's conclusion that the Employers had acted in accordance with their obligations under Section 8(a)(5) of the NLRA when they implemented their final offer to the Union.

In addition to Section 8(a)(5) of the NLRA, the Court of Appeals also found support for its conclusion in Section 4218 of MPPAA, 29 U.S.C. § 1398 which precludes a with-

drawal determination based on the suspension of contributions during a labor dispute. Several lower courts have examined arguments similar to the Pension Fund's here and have said, "As merely a stage in a labor dispute, there is simply no talismanic significance to the presence of an 'impasse.'" *T.I.M.E. D.C., Inc. v. New York State Teamsters Conference Pension & Retirement Fund*, 580 F. Supp. 621, 623 (N.D.N.Y. 1984), *aff'd*, 735 F.2d 60 (2nd Cir. 1984); *T.I.M.E. D.C., Inc. v. I.A.M. National Pension Fund*, 597 F. Supp. 256, 263 (D.D.C. 1984). The Pension Fund's conduct here, in rejecting the Employer's contributions and prematurely imposing a withdrawal on them was contrary to an underlying purpose of Section 4218 of MPPAA, 29 U.S.C. § 1398, to prevent pension fund trustees from interfering in labor disputes.

The Pension Fund cannot demonstrate any departure from established law or precedent. The Pension Fund falsely asserts that the Court of Appeals' decision conflicts with the holdings of other panels within the Ninth Circuit in *Woodward Sand Co. v. Western Conference of Teamsters Trust Fund*, 789 F.2d 691 (9th Cir. 1986) and *Peerless Roofing Co. Ltd. v. NLRB*, 641 F.2d 734 (9th Cir. 1981). This contention is ill-founded and was implicitly rejected by the Court of Appeals in denying the Pension Fund's petition for rehearing and suggestion for rehearing *en banc*.

In *Woodward Sand Co.*, 789 F.2d 691 (9th Cir. 1986), the District Court determined that the employer had permanently withdrawn prior to the enactment of MPPAA on September 26, 1980. It appears that the District Court's decision was based on a finding that the employer had no duty to contribute on behalf of strike replacements in the

context of a strike which began before September 26, 1980. The Ninth Circuit Court of Appeals disagreed and held that the employer had a duty to contribute on behalf of strike replacements absent an impasse to privilege a cessation of contributions. Accordingly, the Court remanded the case to the District Court to determine whether an impasse existed before September 26, 1980.

Woodward Sand is factually and legally distinguishable from the present case. In *Woodward Sand* the Court of Appeals did not determine that a permanent withdrawal always occurs on the date of impasse; rather, the Court merely stated that absent an impasse, a permanent withdrawal could not have occurred despite the employer's cessation of contributions. Here, it is undisputed that an impasse existed on May 23, 1983 to privilege the Employer's implementation of their final offer. It is also undisputed that the final offer, which was lawfully implemented, required contributions to the Pension Fund through August 31, 1983. The Court of Appeals' decision in *Woodward Sand* does not contradict its conclusion in this case that the Employers' obligation to contribute did not cease until September 1, 1983.

Contrary to the Pension Funds' claim, *Peerless Roofing Co. Ltd., v. NLRB*, 641 F.2d 734 (9th Cir. 1981) is not inconsistent with the decision in this case. In fact, the Court of Appeals properly cited to that case in support of its conclusion. In *Peerless Roofing*, the Ninth Circuit Court of Appeals upheld an NLRB determination that an employer violated Section 8(a)(5) of the NLRA by discontinuing payments to the pension fund after the expiration of a collective bargaining agreement. The employer defended on the grounds that the pension contributions

were lawfully discontinued after an impasse in negotiations and that Section 302(c)(5)(B) of the LMRA prohibited further payments into the pension fund.

The Court of Appeals found it unnecessary to determine whether an impasse existed because the employer never had proposed terminating payments to the pension fund during negotiations. Therefore, *even if an impasse existed*, the employer's cessation of contributions to the trust fund violated its obligations under Section 8(a)(5) of the NLRA because the change was not reasonably comprehended by the terms of the employer's offers to the union. The Court of Appeals' decision in *Peerless Roofing* is not inconsistent with its decision in the instant case; it supports that decision. Indeed, it is the Pension Fund that is asserting that withdrawal occurred on a date *inconsistent* with the Employers' final offer to the Union.

Also ill-founded is the Pension Fund's bald assertion that the Court of Appeals' decision is inconsistent with recent decisions of arbitrators. (Pension Fund's Petition, page 8). The arbitrators' decisions in those cases were based on peculiar facts which are not present here. In both cases the arbitrators found that the employer's obligation to contribute ceased on the date the collective bargaining agreement expired. This conclusion was based on the NLRB's determination that the parties' agreement provided that the employer was not obligated to contribute after the contract expiration date, and on the fact that the employer had implemented a proposal to withdraw upon reaching impasse in negotiations. Here, the Pension Fund does not dispute that the Employers had an obligation to contribute following the expiration of the

collective bargaining agreements. Moreover, the proposal which the Employers lawfully implemented specifically required continued contributions until September 1, 1983.

C. The Court of Appeals Applied Settled Precedent Establishing that Section 302(c)(5) of the LMRA Did Not Prohibit the Pension Fund from Accepting Contributions After Impasse

The Pension Fund has claimed that the Employers must be "deemed" to have withdrawn on the date of impasse because Section 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5) prohibited the Pension Fund from accepting the Employers' contributions after that date. The District Court and the Court of Appeals properly rejected this contention based on well-settled law.

Section 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5) is an anti-kickback law designed to insure that unions and union officials do not extort money from employers or accept bribes from them in the guise of trust fund payments. *See e.g., United Mine Workers Health and Retirement Fund v. Robinson*, 455 U.S. 562 (1982), *NLRB v. United Brotherhood of Carpenters and Joiners*, 531 F.2d 424, 427 (9th Cir. 1976). To eliminate this source of corruption, Section 302 of the LMRA prohibits payments by employers to employee representatives. Section 302(c)(5) (B) provides an exception for contributions to a trust fund provided that "the detailed written basis on which said payments are to be made is specified in a written agreement with the employer." 29 U.S.C. § 186(c)(5)(B).

This case falls neither within the intent of Section 302's proscriptions nor its literal language. The NLRB and the courts have consistently held that Section 302

(c)(5) does not proscribe an employer's continued contributions to a trust fund after expiration of a collective bargaining agreement and during negotiations for a new agreement. The written agreement requirement in Section 302(c)(5)(B) is met by a trust agreement underlying an expired contract and by the terms of the expired contract itself. See e.g., *Wayne's Olive Knoll Farms*, 223 NLRB 260, 265 (1976); *Cauthorne Trucking*, 256 NLRB 721, 722 n.6 (1981), modified, 691 F.2d 1023 (D.C. Cir. 1982); *Hinson v. NLRB*, 428 F.2d 133, 138-39 (8th Cir. 1970); *American Distributing Co., Inc. v. NLRB*, 715 F.2d 446 (9th Cir. 1983), cert. denied, 446 U.S. 958 (1984); *Producers Dairy Delivery v. Western Conference of Teamsters*, 654 F.2d 625 (9th Cir. 1981); *Peerless Roofing Co. Ltd. v. NLRB*, 641 F.2d 734, 736 (9th Cir. 1981); *NLRB v. Carilli d/b/a Antonino's Restaurant*, 648 F.2d 1296 (9th Cir. 1981).

The Pension Fund contends that the cases cited by the Court of Appeals relate to contributions due prior to impasse, and that there is no authority for utilizing an expired collective bargaining agreement as a written basis for contributions *ad infinitum* after impasse. The former assertion is erroneous and the latter exaggerates the Court of Appeals' holding well beyond its scope in this case.

As discussed above, the Employers were obligated under Section 8(a)(5) of the NLRA to continue making contributions after impasse because in implementing a withdrawal, the Employers were constrained to act in accordance with their final offer to the Union. All of the above-referenced cases addressing Section 302(c)(5) in the context of contributions following expiration of a col-

lective bargaining agreement conclude that Section 302 (c)(5) is satisfied as long as the Employer is acting in accordance with its legal rights and obligations under Section 8(a)(5) of the NLRA. For purposes of Section 302(c)(5), it is not necessary to find that the collective bargaining agreement *required* the continued contributions; it is only necessary to find that an expired written agreement existed which *privileged* the contributions for purposes of Section 302(c)(5)(B). The Ninth Circuit's conclusions in this regard are shared by other federal courts of appeals that have addressed this issue. See e.g., *Denver Metropolitan Ass'n. of Plumbing, Heating & Cooling Contractors v. Journeyman of Plumbers Local 3*, 586 F.2d 1367, 1373 (10th Cir. 1978); *Hinson v. NLRB*, *supra*, 428 F.2d 133, 138-39 (8th Cir. 1970).

Contrary to the Pension Fund's claim, the Ninth Circuit Court of Appeals specifically has rejected the argument that after impasse an expired collective bargaining agreement does not satisfy the written agreement requirement of Section 302(c)(5)(B) of the LMRA. In *NLRB v. Carilli d/b/a/ Antonino's Restaurant*, 648 F.2d 1206 (9th Cir. 1981), the court stated:

By finding that the expired collected bargaining agreements here are sufficient to permit continued payments to the Trust Funds, we do not as Antonino's contends, hinge criminal liability under Section 302 (c)(5) upon the difficult determination of whether impasse has been reached. The collective bargaining and trust agreements here are sufficient to satisfy the requirements of Section 302(c)(5) and to permit continued payments to the Trust Funds *whether or not the parties have bargained to impasse*.

Id. at 1214, emphasis added. See also *Producers Dairy Delivery v. Western Conference of Teamsters Pension*

Trust Fund, 654 F.2d 625 (9th Cir. 1981) (Section 302(c) (5) did not prohibit the Employer's contributions after impasse because "the payments were made in conformity with the terms of an expired written agreement during the course of collective bargaining negotiations.") and *Peerless Roofing Co. v. NLRB*, 641 F.2d 734 (9th Cir. 1981).

Finally, the Pension Fund reargues the contention rejected by the District Court and the Court of Appeals, that the expired collective bargaining agreements did not fulfill the written agreement requirement because in its final offer, the Employers sought to "carve out a subset of employees for whom [they] will make contributions . . ." (Pension Fund's Petition, page 10) The Pension Fund is unable to cite any relevant authority for this proposition.⁵ The Court of Appeals correctly recognized that the Employers' offer merely exempted from participation employees who had not completed twelve (12) months of continuous service. No contributions were made on behalf of such employees. All contributions made by the Employers after May 23, 1983, were exactly in accordance with the expired collective bargaining agreements which specified monthly contributions at the rate of \$1.25 per hour, payable not later than the 20th day of the following month, pursuant to the rules established by the trustees to facilitate accurate recording and orderly collection. The Pension Fund cites no authority for the novel argu-

⁵ The Pension Fund's citations to cases in which courts have refused to give effect to oral modifications to contractual contribution requirements are inapposite. No oral modification was made in this case.

ment that Section 302(c)(5)(B) requires employee eligibility rules to be specified in a written agreement, or even if it does, that the "detailed basis" requirement is violated by such an omission where the other details supporting the contributions are fully set forth in the written agreement. Moreover, the Pension Fund ignores the fact that the trust agreements, which do not address eligibility rules, are independently sufficient to satisfy the written agreement requirement. *See e.g., Hinson v. NLRB, supra*, 428 F.2d 133 (8th Cir. 1970); *Peerless Roofing Co. v. NLRB, supra*, 641 F.2d 734 (9th Cir. 1981); *American Distributing Company v. NLRB, supra*, 715 F.2d 446 (9th Cir. 1983). In summary, the Court of Appeals correctly found in accordance with established precedent that the expired collective bargaining agreements and trust agreement provided the safeguard against the payment of bribes in the form of trust fund payments to which Section 302(c)(5) is directed.

D. The Court of Appeals' Interpretation of Section 4212(c) of MPPAA is Consistent With Its Legislative History and Statutory Purpose

Both the District Court and the Court of Appeals correctly rejected the Pension Fund's contention that it was privileged to disregard the Employers' final offer in determining the date of withdrawal because the Employers' proposal was a "transaction to evade or avoid withdrawal liability" prohibited by Section 4212(c) of MPPAA, 29 U.S.C. § 1392(c). In its Petition, the Pension Fund argues that "without pointing to any authority, the Circuit Court excepts from the mandate of this statute transactions which are proposed during negotiations."

(Trust Fund's Petition, page 11). The Pension Fund has misrepresented the Court of Appeals' considerably narrower determination.

There is no support for the Pension Fund's argument in the plain wording of the statute or its legislative history. The legislative history clearly states that the purpose of Section 4212(c) of MPPAA is to prevent employers from evading or avoiding withdrawal liability through "transactions which are less than *bona fide* and arms length." 126 Cong. Rec. 23038 (1980) (Statement of Rep. Frank Thompson). In this case, the Court of Appeals recognized that the Employers' proposal, which was made in the course of arms length collective bargaining, did not frustrate the purposes of MPPAA. The proposal was not fraudulent or deceptive in any way. It simply stated that the Employers would continue to make contributions to the Pension Fund through August 31. The employees on whose behalf the contributions were made were to receive full credit under the plan on the basis of these contributions. Thus, insofar as the Employers' and employees' relationship to the Pension Fund were concerned, the Employers' proposal had full economic substance and was *bona fide* in every substance of the word.

The Court of Appeals also recognized that the proposal was not presented for the purpose of "avoiding" or "evading" withdrawal liability. Rather, the Employers hoped to *minimize* their potential liability by changing retirement plans during a year in which there was less unfunded liability. Due to the performance of the Pension Fund's investments and certain amendments adopted by the trustees, there was a dramatic decline in the Pension

Fund's unfunded liability during the plan year ending June 30, 1983. The Employers, who were contributing participants throughout that plan year, merely wanted their share of the unfunded liability to reflect the improvements in the Pension Fund's financial condition during that same period. The Employers have acknowledged their obligation to pay their statutory share of the Pension Fund's unfunded liability. However, the Employers have contended that nothing in MPPAA required them to pick a withdrawal date so as to create a windfall to the Pension Fund.

Whenever an employer withdraws from a multi-employer pension plan, of necessity a specific date for the withdrawal must be selected. Nothing in MPPAA gives the plan the right to select the withdrawal date. On the contrary, MPPAA is clear that the withdrawal date is determined by reference to the employer's obligation to contribute. Subject to the employer's obligation to bargain in good faith with a union representative, nothing in the National Labor Relations Act or any other law precludes the employer from picking the date it wishes to cease participating in a multiemployer pension plan. The resolution of whether and when an employer will withdraw from a pension plan is a function of the collective bargaining process regulated by federal labor law. The Pension Fund's suggestion that it is permitted to interject itself into the bargaining process in order to select a withdrawal date consistent with its own economic interests would frustrate the collective bargaining process and is unsupportable.

The only authority the Pension Fund musters in support of its argument is an anomalous reference to an

NLRB case holding that an employer's proposal to enter into a collective bargaining agreement of short duration violated its duty to bargain in good faith. (Pension Fund's Petition, page 11) That holding is completely irrelevant to Section 4212(c) of MPPAA. Moreover, here, the NLRB dismissed the Union's charge alleging that the Employers had violated their duty to bargain in good faith with the Union, and held that the Employers had acted lawfully when they implemented their final offer requiring contributions to the Pension Fund until September 1, 1983. Thus, even if the Pension Fund were correct that Section 4212(c) of MPPAA incorporates the good faith bargaining standard of Section 8(a)(5) of the NLRA, the NLRB determined that the Employers met that standard here.

The Court of Appeals properly construed Section 4212(c) of MPPAA in accordance with its legislative history and the overall purposes of MPPAA, and determined that it did not justify the Pension Fund's imposition of a May 23, 1983 withdrawal date. Consistent with the language and intent of MPPAA, the Employers properly are accountable for their statutory share of the Fund's unfunded liability as of September 1, 1983, the date they ceased making contributions to the Pension Fund in accordance with their final offer and their legal rights and obligations under Section 8(a)(5) of the NLRA.

CONCLUSION

For the reasons suggested above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

ADDITIONAL STATUTES INVOLVED

Multiemployer Pension Plan Amendments Act of 1980

1. Section 4212(c), 29 U.S.C. § 1392(c) provides:

“If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and calculated) without regard to such transaction.”

2. Section 4218, 29 U.S.C. § 1398 provides:

“Notwithstanding any other provision of this part, an employer shall not be considered to have withdrawn from a plan solely because—

* * *

(2) An employer suspends contributions under the plan during a labor dispute involving its employees.”
